YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener)

FEDERAL COURT (PUTRAJAYA) — NOTICE OF MOTION NO 06–04 OF 2009(A)
ALAUDDIN PCA, ARIFIN ZAKARIA CJ (MALAYA), NIK HASHIM, AUGUSTINE PAUL AND ZULKEFLI FCJJ
3 JUNE 2009

Administrative Law — Remedies — Declaration — Applicants suspended from attending sessions of State Legislative Assembly of Perak on alleged acts of contempt — Whether suspension of applicants null and void — Whether applicants ought to have proceeded for judicial review instead of declaratory relief — Whether issues raised by appellants justiciable — Whether there was any power to authorise suspension of applicants — Specific Relief Act 1950 s 41 — Rules of the High Court 1980 O 15 r 16, O 53 — Standing Orders of the State Assembly of Perak Order 72 — Legislative Assembly (Privileges) Enactment 1959

On 6 February 2009, YAB Dato' Dr Zambry bin Abd Kadir, the first applicant, was sworn in as the Menteri Besar of Perak in place of YB Dato Seri Mohammad Nizar Jamaluddin ('Nizar'). The first applicant then proceeded to appoint the second to seventh applicants as his Executive Council Members ('the EXCO members') and on 10 February 2009 the said applicants were accordingly sworn in as State Executive Councillors of Perak. On 11 February 2009, the Assemblyman from Taman Canning ('the complainant') wrote to the Speaker of the State Legislative Assembly of Perak, the respondent, to complain that the applicants had committed acts of contempt against the State Legislative Assembly of Perak. Based on this complaint the respondent issued a summons, pursuant to Standing Order 72 of the Standing Orders of the State Assembly of Perak (Standing Order 72), to the applicants requiring them to attend before the Committee of Privileges (the committee) on 18 February 2009 to answer to a charge of breach of privileges. The breach of privileges complained of arose from alleged acts of contempt committed by the applicants; the alleged acts of contempt were that the first applicant wrongly holding himself out as Menteri Besar of Perak and acting illegally by appointing the other applicants as EXCO members and the other applicants wrongly holding themselves out as EXCO members, contrary to the provisions of the Perak Constitution while the legally appointed Menteri Besar of Perak, Nizar, and his EXCO were still in office. The applicants appeared before the committee as required and stated that they did not recognise or submit to the committee's jurisdiction. On

A 19 February, the committee found the applicants guilty of the charges of contempt and suspended the first applicant from attending the sessions of the State Assembly for a period of 18 months and the other applicants for 12 months. The applicants thereafter filed an originating summons in the High Court seeking, inter alia, orders for a declaration that the decision of the B respondent in suspending them from attending the State Legislative Assembly for a period of 18 months and 12 months respectively was against the laws of the constitution of Perak and therefore null and void. The applicants then filed a notice of motion in the Federal Court for certain questions to be answered pursuant to art 63 of the Constitution of Perak (art 63). These C questions involved, inter alia, a consideration of whether the respondent's decision in suspending the applicants from attending the State Legislative Assembly was null and void. At this hearing the respondent raised the objection that as he had been sued in his capacity as Speaker, the action ought to have been commenced under O 53 of the Rules of the High Court 1980 D ('RHC') for judicial review. In addition, in reliance on art 72 of the Federal Constitution ('Constitution') and the Legislative Assembly (Privileges) Enactment 1959 ('Enactment') of Perak, the respondent submitted that the issues raised by the appellants were not justiciable. The applicants in their reply submitted that O 53 of the Rules of the High Court 1980 ('RHC') was E not applicable as there was no review of any decision and that since they were seeking to have their legal rights asserted under s 41 of the Specific Relief Act 1950 ('the Act'), O 53 was not the appropriate remedy.

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Held, granting an order in terms of prayers (a)(1) and (4) of the originating summons with no order as to costs:

(1) The challenge of the applicants to their suspension from the Legislative G Assembly was a matter that affected their legal status within the meaning of s 41 of the Act and the applicants were therefore entitled to seek a declaration of their legal right, pursuant to O 15 r 16 of the RHC 1980. Any restrictions there may be on the use of O 15 r 16 will not apply where a person seeks to assert, inter alia, his right to a legal status, H which in this case is statutorily recognised in the form of s 41. In the circumstances, it could not be argued that the applicants ought to have proceeded under O 53 for declaratory relief because, firstly O 53 does not say that it is the exclusive provision for the grant of declaratory relief for the infringement of rights of those entitled to protection under I public law; and secondly because when the Act was enacted O 53 was not in existence and, thus adherence to it could not have been contemplated. In any event, in cases of this nature the most appropriate form of relief is by way of declaration (see paras 30–32).

(2) Article 72 of the Constitution must be read as being subject to the

existence of a power or jurisdiction, either inherent or express, to do whatever is necessary. Thus, the court is empowered to ascertain whether a particular power that had been claimed had in fact been provided for. The issues raised by the applicant as to whether their suspensions from attending the State Legislative Assembly were null and void were therefore justiciable (see para 46).

(3) The alleged acts of contempt in this case, that is, the first applicant wrongly holding himself out as Menteri Besar of Perak and the other applicants holding themselves out as EXCO members were committed beyond the walls of the Legislative Assembly. The summonses which were issued to the applicants pursuant to Standing Order 72 authorise the Committee to take cognizance of '… any matter which appears to affect the powers and privileges of the Assembly …'. These summonses stated that the applicants' acts constituted contempt but as contempt had not been specifically prescribed for, the acts cannot come within the ambit of Standing Order 72. Even the Enactment does not contain any provision for the offence of contempt and its punishment. As such, the suspension of the applicants on account of the alleged contempt committed by them was null and void (see paras 57 & 59).

[Bahasa Malaysia summary

Pada 6 Februari 2009, YAB Dato' Dr Zambry bin Abd Kadir, pemohon pertama, telah mengangkat sumpah sebagai Menteri Besar Perak menggantikan YB Dato Seri Mohammad Nizar Jamaluddin ('Nizar'). Pemohon pertama kemudian seterusnya melantik pemohon-pemohon kedua hingga ketujuh sebagai ahli-ahli Majlis Mesyuarat ('ahli-ahli EXCO') dan pada 10 Februari 2009 pemohon-pemohon tersebut telah mengangkat sumpah sewajarnya sebagai ahli-ahli Majlis Mesyuarat Negeri Perak. Pada 11 Februari 2009, ahli dewan dari Taman Canning ('pengadu') yang telah menulis kepada Speaker Dewan Undangan Negeri Perak, responden, untuk mengadu bahawa pemohon-pemohon telah melakukan tindakan-tindakan penghinaan terhadap Dewan Undangan Negeri Perak. Berdasarkan aduan ini responden telah mengeluarkan saman, menurut A 72 Peraturan Mesyuarat Dewan Undangan Negeri Perak ('Peraturan Mesyuarat 72'), kepada pemohon-pemohon yang menghendaki mereka menghadirkan diri di hadapan Jawatankuasa Hak dan Kebebasan ('jawatankuasa') pada 18 Februari 2009 untuk menjawab pertuduhan kerana pelanggaran hak istimewa. Pelanggaran hak istimewa yang diadu berbangkit daripada tindakan-tindakan penghinaan yang dilakukan oleh pemohon-pemohon; tindakan-tindakan penghinaan yang didakwa adalah pemohon pertama telah secara salah mengemukakan dirinya sebagai Menteri Besar Perak dan telah bertindak menyalahi undang-undang dengan melantik pemohon-pemohon lain sebagai ahli-ahli EXCO dan pemohon-pemohon lain telah secara salah

A mengemukakan diri mereka sebagai ahli-ahli EXCO, yang bertentangan dengan peruntukan Perlembagaan Perak tatkala Menteri Besar Perak yang sah dilantik, Nizar, dan EXCOnya masih memegang jawatan. Pemohon-pemohon telah menghadirkan diri di hadapan jawatankuasa seperti yang dikehendaki dan menyatakan bahawa mereka tidak menyedari atau B menyerah kepada bidang kuasa jawatankuasa. Pada 19 Februari, jawatankuasa mendapati pemohon-pemohon bersalah terhadap pertuduhan-pertuduhan penghinaan dan telah menggantung pemohon pertama daripada menghadiri sesi Dewan Undangan Negeri untuk tempoh 18 bulan dan pemohon-pemohon lain selama 12 bulan. Pemohon-pemohon C berikutan itu telah memfailkan saman pemula di Mahkamah Tinggi memohon, antara lain, perintah-perintah untuk deklarasi bahawa keputusan responden menggantung mereka daripada menghadiri Dewan Undangan Negeri untuk tempoh 18 bulan dan 12 bulan masing-masing adalah bertentangan dengan undang-undang Perlembagaan Perak dan oleh itu D adalah batal dan tak sah. Pemohon-pemohon kemudian telah memfailkan notis usul di Mahkamah Persekutuan untuk persoalan-persoalan tertentu yang perlu dijawab menurut perkara 63 Perlembagaan Perak (perkara 63). Persoalan-persoalan tersebut melibatkan, antara lain, pertimbangan sama ada keputusan responden dalam penggantungan pemohon-pemohon daripada E menghadiri Dewan Perundangan Negeri adalah batal dan tak sah. Semasa perbicaraan ini responden telah menimbulkan bantahan bahawa memandangkan dia telah disaman dalam kapasitinya sebagai Speaker, tindakan itu patut dimulakan di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk semakan kehakiman. Tambahan pula, dengan F bergantung kepada perkara 72 Perlembagaan Persekutuan ('Perlembagaan') dan Enakmen (Hak Istimewa) Dewan Perundangan 1959 Perak ('Enakmen'), responden menghujahkan bahawa isu-isu yang ditimbulkan oleh perayu-perayu tidak boleh diadili. Pemohon-pemohon dalam jawapan balas mereka menghujahkan bahawa A 53 Kaedah-Kaedah Mahkamah Tinggi G 1980 ('KMT') tidak terpakai kerana tidak ada semakan untuk apa-apa keputusan dan memandangkan mereka memohon agar hak undang-undang mereka menegaskan bahawa di bawah s 41 Akta Relief Spesifik 1950 ('Akta'), A 53 bukan remedi yang sesuai.

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Diputuskan, membenarkan perintah seperti yang dipohon di dalam (a)(1) dan (4) saman pemula tanpa perintah untuk kos:

I (1) Cabaran pemohon-pemohon terhadap penggantungan mereka daripada Dewan Undangan merupakan perkara yang menjejaskan status perundangan mereka dalam maksud s 41 Akta dan pemohon-pemohon dengan itu berhak memohon deklarasi terhadap hak perundangan mereka, menurut A 15 k 16 KMT. Sebarang sekatan yang mungkin wujud dalam penggunaan A 15 k 16 tidak boleh

terpakai di mana seseorang memohon untuk menegaskan, antara lain, haknya terhadap status perundangan, yang mana dalam kes ini dikenalpasti secara statutori dalam bentuk s 41. Dalam keadaan sedemikian, tidak boleh dipertikaikan bahawa pemohon-pemohon sepatutnya mengambil tindakan di bawah A 53 untuk relief deklarasi kerana, pertamanya A 53 tidak menyatakan bahawa ia adalah peruntukan eksklusif untuk membenarkan relief deklarasi kerana pelanggaran hak terhadap mereka yang berhak mendapat hak istimewa di bawah undang-undang awam; dan keduanya kerana apabila Akta tersebut digubal A 53 tidak wujud dan, oleh itu pematuhannya tidak mungkin dapat dijangkakan. Walau bagaimanapun, dalam kes-kes sebegini bentuk relief yang paling sesuai adalah melalui deklarasi (lihat perenggan 30–32).

(2) Perkara 72 Perlembagaan hendaklah dibaca sebagai yang tertakluk kepada kewujudan suatu kuasa atau bidang kuasa, sama ada sedia ada atau nyata, untuk berbuat apa yang perlu. Oleh itu, mahkamah diberi kuasa untuk menentukan sama ada kuasa tertentu yang didakwa sememangnya diperuntukkan. Isu-isu yang dibangkitkan oleh pemohon-pemohon tentang sama ada penggantungan mereka menghadiri Dewan Undangan Negeri adalah batal dan tak sah dengan itu dapat diadili (lihat perenggan 46).

(3) Tindakan-tindakan penghinaan yang dikatakan dalam kes ini, iaitu, pemohon pertama secara salah telah mengemukakan dirinya sebagai Menteri Besar Perak dan pemohon-pemohon lain mengemukakan diri mereka sebagai ahli-ahli EXCO telah dilakukan di luar Dewan Undangan. Guaman-guaman yang telah dikeluarkan ke atas pemohon-pemohon menurut Peraturan Mesyuarat 72 memberi kuasa kepada Jawatankuasa untuk mengambil perhatian tentang '… any matter which appears to affect the powers and privileges of the Assembly …'. Guaman-guaman tersebut menyatakan bahawa tindakan-tindakan pemohon-pemohon membentuk penghinaan tetapi oleh kerana penghinaan tidak ditetapkan secara spesifik, tindakan-tindakan tersebut boleh terangkum dalam skop Peraturan Mesyuarat 72. Bahkan Enakmen tidak mengandungi apa-apa peruntukan bagi kesalahan penghinaan dan hukumannya. Oleh itu, penggantungan pemohon-pemohon berdasarkan penghinaan yang dikatakan telah dilakukan oleh mereka adalah batal dan tak sah (lihat perenggan 57 & 59).]

Notes

For cases on declaration, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 500–571.

Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2008] 5 MLJ 773, CA (refd)

Ah Thian v Government of the Federation of Malaya [1976] 2 MLJ 112, FC (refd)

Attorney General of Hong Kong v Zauyah Wan Chik and another appeal [1995] 2 MLJ 620, CA (refd)

B Surinder Singh Kanda v The Government of The Federation of Malaya [1962] MLJ 169, PC (refd)

Bradlaugh v Gossett (1884) 12 QBD 271 (refd)

British Railway Board v Pickin [1974] AC 765 (refd)

Cooper v Union of India AIR 1970 SC 1318 (refd)

Dato Seri Anwar bin Ibrahim v Perdana Menteri Malaysia & Anor [2007] 4 MLJ 422, CA (refd)

Doyle v Falconer (1865–67) LR 1 PC 328 (refd)

Fan Yew Teng v Government of Malaysia [1976] 2 MLJ 262, HC (refd)

Fenton v Hampton [1858] 11 Moore 347 (refd)

Haji Salleh bin Jafaruddin v Datuk Celestine Ujang & Ors [1986] 2 MLJ 412, SC (refd)

JB Jeyaratnam v Attorney General of Singapore [1989] 1 MLJ 137, CA (refd)

Jehan v Eugene AIR 1942 Cal 35 (refd)

Kielley v Carson [1841–1842] 4 Moore 63 (refd)

Lim Cho Hock v Speaker, Perak State Legislative Assembly [1979] 2 MLJ 85, HC (refd)

Lim Kit Siang v Dato Seri Dr Mahathir Mohamed [1987] 1 MLJ 383, SC (refd)

O'Reilly v Mackman [1982] 3 All ER 1124, HL (refd)

Raja Ram Pal v The Hon'ble Speaker, Lok Sabha & Ors, SCC 3 [2007] 184 YK (refd)

Petaling Tin Bhd v Lee Kian Chan [1994] 1 MLJ 657, SC (refd)

Robert Cheah Foong Chiew v Lembaga Jurutera Malaysia [2009] 1 MLJ 676, CA (refd)

Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2002] 2 MLJ 413, CA (refd)

Speaker of the National Assembly, The v De Lille MP & Anor [1999] ZASCA 50, CA (refd)

Steed v Secretary of State for the Home Departure [2000] 3 All ER 226 (refd)

Sugumar Balakrishnan v Chief Minister of State of Sabah & Anor [1989] 1 MLJ 233, HC (refd)

Teh Guan Teik v Inspector General of Police [1998] 3 MLJ 137, FC (refd)

Tun Datu Haji Mustapha bin Datu Harun v Legislative Assembly of State of Sabah & Ors [1986] 2 MLJ 388, HC (refd)

Tun Datuk Haji Mohamed Adnan Robert v Tun Datu Haji Mustapha bin Datu Harun; Datuk Joseph Pairin Kitingan v Tun Datu Haji Mustapha bin Datu Harun [1987] 1 MLJ 471, SC (refd)
Lim Kit Siang v Dato Seri Dr Mahathir Mohamad [1987] 1 MLJ 383, SC (refd)

Legislation referred to

Constitution of Perak art 63
Courts of Judicature Act 1964 Schedule paras 1, 8
Federal Constitution art 72(1)
Legislative Assembly and Legislative Assembly (Privileges) Enactment 1959
Parliament (Privileges and Powers) Act 1952
Parliament (Privileges, Immunities and Powers) Act 1985
Rules of the High Court 1980 O 15 r 16, O 53
Rules of the Supreme Court [UK] O 53
Specific Relief Act 1950 s 41

Firoz Hussein (Hafarizam Harun, Syed Faisal, Abu Bakar As Sidek, Cheng Mai, Badrul Hisham, Mohd Reza and Shahir Ab Razak with him) (Ong-Hanim & Badrul) for the appellants.
Sulaiman Abdullah (Philip Koh, Ranjit Singh, Chan Kok Keong, Razlan Hadri bin Zulkifli, Edmund Bon and Amer Hamzah with him) (Chan & Associates) for the respondent.
Abdul Gani Patail (Abd Majid Tun Hamzah, Kamaludin Md Said, Azizah Nawawi, Amarjeet Singh and Suzana Atan with him) (Attorney General's Chambers) for the intervener.
Ahmad Kamal bin Md Shahid (State Legal Advisor) watching brief for the Government of Perak.

Augustine Paul FCJ:

[1] On 6 February 2009 YAB Dato' Dr Zambry bin Abdul Kadir (the first applicant) was sworn in before His Royal Highness the Sultan of Perak as the Menteri Besar of Perak in place of YB Dato' Seri Mohammad Nizar Jamaluddin. On 10 February 2009 YB Encik Zainol Fadzli Paharuddin (the second applicant), YB Datuk Ramly Zahari (the third applicant), YB Puan Hamidah Osman (the fourth applicant), YB Datuk Saarani Mohammed (the fifth applicant), YB Encik Mohd Zahir Abdul Khalid (the sixth applicant) and YB Dr Mah Hang Soon (the seventh applicant) were sworn in before His Royal Highness the Sultan of Perak as State Executive Councillors of Perak.

[2] By a letter dated 11 February 2009, the Assemblyman from Taman Canning complained to the respondent, who is the speaker of the State Legislative Assembly of Perak, that the applicants had committed acts of contempt of the State Legislative Assembly. The material parts of the letter read as follows:

A Re: Contempt of our August Perak State Assembly by YB Dr Zambry Abdul Kadir, Zainol Fadzi Paharuddin, Ramly Zahari, Hamidah Osman, Saarani Mohamad, Mohd Zahir Abdul Khalid dan Dr Mah Hang Soon

1. I am under duty to complain against the above persons who over the last two weeks have acted in manner calculated to bring down the honour, dignity and
B good name of our august Perak State Assembly.

2. The provisions of the Perak Constitution, whose provisions are the supreme law of Perak, have been ignored. YB Dr Zambry and others have sworn to preserve, protect and defend the Perak State Constitution (Article XLVII).

C 3. I believe that YB Dr Zambry and others should be referred to the Committee of Powers and Privileges under Standing Orders 72.

4. I draw your attention and set out below in full Article XVI(6) of the Perak State Constitution:

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> (6) If the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly, then, unless at his request His Royal Highness dissolves the Legislative Assembly, he shall tender the resignation of the Executive Council.

E 5. YB Dr Zambry, who is the leader and others comprising of Zainol Fadzi Paharuddin, Ramly Zahari, Hamidah Osman, Saarani Mohamad, Mohd Zahir Abdul Khalid and Dr Mah Hang Soon have clearly acted outside the terms of the Article as the Menteri Besar and his EXCO have not resigned.

F 6. Under the Perak State Constitution and by conventions recognized by highest principles of constitutional law, the government of the day should continue. YB Dr Zambry is acting illegally by appointing an EXCO contrary to our supreme law.

7. Our august Perak State Assembly is now besieged by YB Dr Zambry and others which actions are detrimental to the good name and smooth running of our August
G Perak State Assembly. We are being made the laughing stock of the world!

8. As honourable State Assemblymen, and this includes YB Dr Zambry and others, they are bound by the rulings and resolutions. As we have not decided otherwise by any resolution or State Assembly to remove YAB Dato Seri Mohammad Nizar Jamaluddin, the action of YB Dr Zambry and others should be called into account
H immediately in order to prevent further confusion and chaos.

9. As a matter of urgency, kindly do the necessary by calling a meeting of the Committee of Powers and Privileges.

I **[3]** On 13 February 2009 the respondent issued a summons pursuant to Standing Order 72 of the Standing Orders of the State Assembly of Perak containing the alleged breaches of privilege and a direction against the first applicant to attend before the Committee of Privileges on 18 February 2009. The material parts of the summons read as follows:

YANG DIPERTUA

DEWAN NEGERI PERAK DARUL RIDZUAN

To: YB Datuk Dr Zambry Abdul Kadir… DEFENDANT

COMMITTEE OF PRIVILEGES MEETING SUMMONS TO ATTEND

Pursuant to Standing Orders of the State Legislative Assembly of Perak Darul Ridzuan

[Diluluskan oleh Dewan Perhimpunan Undangan Negeri Perak Darul Ridzuan, dalam' Mesyuarat Pertama, Penggal Kedua, Dewan Perhimpunan Undangan Negeri Perak Darul Ridzuan yang Ketujuh pada 23.3.1988, menurut Kertas Dewan Bil. 11/88 dan berkuatkuasa mulai 1.5.1988.]

TAKE NOTICE that pursuant to a complaint by YB Encik Wong Kah Woh ('the Complainant'), State Assemblyman for Canning Garden ('letter' annexed and marked Annexure 'A') that you, the Defendant be referred to the Committee of Powers and Privileges ('the Committee'); the Committee shall meet, in accordance with SO 72 to Consider this matter on the date, time and place stated below:

DATE: 18/2/2009

TIME: 2.30 PM

PLACE: Aras G, Bilik Mesyuarat Pejabat Kewangan Ng. Perak, Bangunan Perak Darul Ridzuan.

Mr Speaker, being satisfied, that a prima facie breach of privileges has been committed by you, the Defendant is bound to refer such matter to the Committee (Annexure 'B')

(I) WHEREAS YAB Dato Seri Mohammad Nizar Jamaluddin has been validly and legally appointed the Menteri Besar of Perak under Article XII of the Perak Constitution which appointment is valid until there is a resignation;

(II) AND WHEREAS the Honourable Menteri Besar Dato Seri Mohammad Nizar Jamaluddin has not lost any vote of confidence in our august State Assembly;

(III) AND WHEREAS the State Constitution contains neither express nor implied power for dismissal of the Menteri Besar;

You, the defendants are, therefore, required to be present before the Committee in respect of the breach of privileges complained of as enumerated below:

(i) That contrary to the provision of the Perak Constitution, you have and are wrongly held yourselves out as EXCO members;

(ii) That you have unlawfully agreed to participate in an illegal EXCO

despite an existing body validly appointed whose members have neither resigned their office nor have their appointments been validly terminated under the Perak Constitution;

(iii) And that you and others have illegally occupied and taken possession of the office of the State Secretariat and thereby committing trespass and liable to be sued for exemplary damages;

(iv) And that the above actions constitute CONTEMPT against our august State Assembly and is obstructing its smooth running and functioning;

(v) And that such CONTEMPT, in particular, has embarrassed the Honourable the Menteri Besar, YAB Dato Seri Mohammad Nizar Jamaluddin and had prevented his EXCO from discharging and performing their duties under the Perak Constitution;

(vi) And that such CONTEMPT as displayed by you, the Defendants, is conduct unbecoming of honourable members of our august Perak State Assembly and contrary to the Standing Orders, Perak Constitution and the Rukunegara in particular, Principle 5 – Good Behaviour and Morality;

(vii) And that such conduct unbecoming has brought the good name of our august State Assembly into disrepute, public ridicule, odium and scandal;

All persons and witnesses required to attend before the Committee shall dress in lounge suit or any other smart attire permitted by the Committee and shall be examined on oath.

No legal representation is permitted. (see Erskine May's Parliamentary Practice 16th ed P 139)

If you choose to absent yourself, the Committee will proceed to deliberate and make the necessary findings which will include suspension or expulsion from our August State Assembly.

Dated this 13th day of February 2009.

By Order,

V SIVAKUMAR

SPEAKER

PERAK STATE ASSEMBLY

cc. Members of the Committee of Privileges.

[4] The respondent also sent a similar summons containing the alleged breaches of privilege and a direction to each of the second to the seventh applicants to attend before the committee of privileges. The material parts of the summons read as follows:

YANG DIPERTUA DEWAN NEGERI PERAK DARUL RIDZUAN

COMMITTEE OF PRIVILEGES MEETING SUMMONS TO ATTEND

Pursuant to Standing Orders of the State Legislative assembly of Perak Darul Ridzuan

[Diluluskan oleh Dewan Perhimpunan Undangan Negeri Perak Darul Ridzuan, dalam Mesyuarat Pertama, Penggal Kedua, Dewan Perhimpunan Undangan Negeri Perak Darul Ridzuan yang Ketujuh pada 23.3.1988, menurut Kertas Dewan Bil. 11/88 dan berkuatkuasa mulai 1.5.1988.]

TAKE NOTICE that pursuant to a complaint by YB Encik Wong Kah Woh ('the Complainant'), State Assemblyman for Canning Garden ('letter' annexed and marked Annexure 'A') that you, the defendant be referred to the Committee of Powers and Privileges ('the Committee'); the Committee shall meet, in accordance with SO 72 to Consider this matter on the date, time and place stated below:

DATE: 18/2/2009

TIME: 2.30 PM

PLACE: Aras G, Bilik Mesyuarat Pejabat Kewangan Ng. Perak, Bangunan Perak Darul Ridzuan.

Mr Speaker, being satisfied, that a prima facie breach of privileges has been committed by the Defendants is bound to refer such matter to the Committee (Annexure 'B')

(I) WHEREAS YAB Dato Seri Mohammad Nizar Jamaluddin has been validly and legally appointed the Menteri Besar of Perak under Article XII of the Perak Constitution which appointment is valid until there is a resignation;

(II) AND WHEREAS the Honourable Menteri Besar Dato Seri Mohammad Nizar Jamaluddin has not lost any vote of confidence in our August State Assembly;

(III) AND WHEREAS the State Constitution contains neither express nor implied power for dismissal of the Menteri Besar; You, the Defendants are, therefore, required to be present before the Committee in respect of the breach of privileges complained of as enumerated below:

(i) That contrary to the provision of the Perak Constitution, you have and are wrongly held yourselves out as EXCO members;

(ii) That you have unlawfully agreed to participate in an illegal EXCO despite an existing body validly appointed whose members have neither resigned their office nor have their appointments been validly terminated under the Perak Constitution;

(iii) And that you and others have illegally occupied and taken possession of the office of the State Secretariat and thereby committing trespass;

(iv) And that the above actions constitute CONTEMPT against our august State Assembly and is obstructing its smooth running and functioning;

(v) And that such CONTEMPT, in particular, has embarrassed the Honourable the Menteri Besar, YAB Dato Seri Mohammad Nizar Jamaluddin and had prevented his EXCO from discharging and performing their duties under the Perak Constitution;

(vi) And that such CONTEMPT as displayed by you, the Defendants, is conduct unbecoming of honourable members of our august Perak State Assembly and contrary to the Standing Orders, Perak Constitution and the Rukunegara in particular, Principle 5 – Good Behaviour and Morality;

(vii) And that such conduct unbecoming has brought the good name of our august State Assembly into disrepute, public ridicule, odium and scandal;

All persons and witnesses required to attend before the Committee shall dress in lounge suit or any other smart attire permitted by the Committee and shall be examined on oath.

No legal representation is permitted. (see Erskine May's Parliamentary Practice 16th ed. P. 139)

If you choose to absent yourself, the Committee will proceed to deliberate and make the necessary findings which will include suspension or expulsion from our august State Assembly.

Dated this 13th day of February 2009.

By Order,

V SIVAKUMAR

SPEAKER

PERAK STATE ASSEMBLY

cc Members of the Committee of Privileges.

[5] The applicants appeared at the appointed time and place as stated in the summons under protest and read out a written objection to the committee of privileges stating that they did not recognise or submit to the jurisdiction of the said committee. The material parts of the written objection read as follows:

NOTIS SAMAN UNTUK HADIR KE MESYUARAT JAWATANKUASA KEBEBASAN BERTARIKH 13.02.09 YANG DIKELUARKAN OLEH YDP DEWAN UNDANGAN NEGERI PERAK

BANTAHAN AWAL

AMBIL PERHATIAN bahawa kehadiran Y.A.B Menteri Besar dan kesemua 6 ahli-ahli Majlis Mesyuarat Kerajaan (MMK) pada hari ini (18.02.09) di dalam mesyuarat Jawatankuasa (J/K) Kebebasan bukan bermakna kami mengiktiraf dan memperakui bidangkuasa J/K ini ke atas kami.

Kehadiran kami di mesyuarat J/K ini adalah DENGAN BANTAHAN atas alasan-alasan berikut;

a. Saman untuk hadir ini dikatakan telah dikeluarkan di bawah Perintah Tetap (P.T) 72 kerana kami dikatakan telah melakukan kesalahan melanggar peraturan hak-hak dan kebebasan Dewan. Adalah menjadi hujahan kami bahawa 'kesalahan melanggar peraturan hak-hak dan kebebasan Dewan' hendaklah bersangkutan dengan kesalahan-kesalahan yang berlaku di dalam Dewan dan bukannya di luar Dewan. Jika dilihat kepada kesalahan-kesalahan yang dikatakan dilakukan oleh kami di ms 2, 3 dan 4 notis bertarikh 13.02.09 (yang mana dinafikan sekerasnya-kerasnya), ianya jelas menunjukkan kesalahan-kesalahan yang dikatakan berlaku tersebut adalah di luar Dewan dan bukannya di dalam Dewan.

Dr Subhash C. Kashyap di dalam bukunya Parliamentary Procedure, Law Privileges Practice & Precedents, Second Edition telah berkata di m.s 913

> ... the litmus test of privilege is whether the matter sought to be raised as a question of privilege has a direct nexus with the business of the House or its Committees. If not, no question of privilege would arise.

Berdasarkan kepada perkara di atas, kami menghujah bahawa tiada kausa tindakan yang sah (cause of action) telah dilakukan oleh kami yang menjustifikasikan kami dipanggil.

b. Dalam pada itu, kami juga ingin mengingatkan J/K yang mulia ini bahawa kesalahan-kesalahan kebebasan yang dikatakan dilakukan oleh kami seperti di para (i) (ii) (v) di m.s 2 dan 3 notis bertarikh 13.02.09 (yang mana dinafikan sekeras-kerasnya) adalah berkaitan satu isu yang berkaitan dengan tindakan undang-undang yang di failkan oleh Dato Seri Ir Hj Mohamed Nizar bin Jamaludin ke atas Dato Dr Zambry bin Abd Kadir melalui kes Mahkamah Tinggi Kuala Lumpur Permohonan Semakan Kehakiman No. 25-25-2009. Oleh yang demikian, ianya adalah 'sub-judice'.

P.T 23(i)(g) menyatakan;

> Tiap-tiap soalan itu hendaklah menepati peraturan-peraturan yang berikut:
>
> (g) sesuatu soalan itu tidak boleh digubal dengan cara yang mungkin memudaratkan sesuatu kes yang sedang dibicarakan, atau tentang apa-apa perkara dalam pertimbangan mahkamah.

Manakala P.T 36(2) pula menyatakan;

> Rujukan tidak boleh dibuat kepada apa-apa perkara yang sedang dalam timbangan Mahkamah sekiranya pada pertimbangan Pengerusi boleh menyentuh kepentingan-kepentingan pihak-pihak yang berkenaan.

A Kami menghujah sekiranya di dalam isi-isi soalan yang dikemukakan di dalam Dewan seperti yang termaktud di dalam P.T. 23 (1) (g) serta kandungan ucapan di dalam P.T 36(2) yang dibangkitkan dalam Dewan Yang Mulia mengenai perkara-perkara di dalam timbangan Mahkamah tidak boleh sama sekali digubal atau dibangkitkan oleh mana-mana pihak kerana boleh menyentuh kepentingan
B pihak-pihak di dalam kes Mahkamah, maka kami tidak nampak bagaimana J/K yang mulia ini boleh merujukkan, menyiasat dan membicarakan sesuatu perkara yang sedang dipertimbangkan di mahkamah untuk mendapatkan penjelasan daripada kami. Oleh yang demikian, kami menghujah perkara-perkara ini sewajarnya dibiarkan kepada Mahkamah Tinggi Kuala Lumpur untuk dibicarakan bagi menentukan kesahihan Menteri Besar dan barisan MMK yang dilantik oleh
C DYMM Sultan Perak. Sehingga perkara ini diputuskan oleh Mahkamah Tinggi, 'status quo' mengenai kesalahan-kesalahan yang dikatakan dilakukan oleh kami di para (i) (ii) (iv) di m.s 2 dan 3 notis bertarikh 13.02.09 tersebut (yang mana dinafikan sekeras-kerasnya) tidak seharusnya dirujuk, disiasat dan dibicarakan oleh J/K yang mulia ini.

D c. Kami juga menghujah J/K yang mulia ini bukanlah forum yang sesuai untuk merujuk, menyiasat atau membicarakan penyalahgunaan kebebasan yang dikatakan dilakukan oleh kami di para (i) (ii) (iv) m.s 2 dan 3 notis bertarikh 13.02.09 tersebut (yang mana dinafikan sekeras-kerasnya) kerana perkara sama sudahpun berada di pertimbangan Mahkamah Tinggi Kuala Lumpur yang mana tarikh
E sebutannya telah ditetapkan pada hari ini (18.0209). Oleh itu sewajarnya perkara ini tidak dirujuk, disiasat dan dibicarakan pada mesyuarat J/K ini dan ianya hendaklah ditentukan dan dibicarakan di Mahkamah Tinggi Kuala Lumpur.

Berdasarkan kepada hujahan-hujahan kami di atas, maka kami menghujah penyalahgunaan kebebasan yang dikatakan dilakukan oleh kami di para (iii) (iv) (vi)
F (vii) dan (viii) m.s 2, 3 dan 4 notis bertarikh 13.02.09 tersebut (yang mana dinafikan sekeras-kerasnya) adalah tidak berbangkit dan 'non-issue'.

Bertarikh pada 18.02.09.

G **[6]** On 19 February 2009 the first applicant was served with a letter dated 18 February 2009 which stated that the respondent had found him guilty as charged and in exercising his powers as speaker suspended him from attending sessions of the State Legislative Assembly for a period of 18 months. The material parts of the letter suspending him read as follows:

H

YANG DIPERTUA DEWAN NEGERI PERAK DARUL RIDZUAN

Yang Berhormat Ahli Dewan Undangan untuk Pangkor, Dato Dr. Zambry Abdul Kadir telah disaman di hadapan Jawatankuasa Hak dan Kebebasan berdasarkan dakwaan seperti disaman.

I

Saya telah mengadakan suatu mesyuarat untuk mendengar keterangan Pengadu, YB Wong Kah Woh, Ahli Dewan Undangan Negeri untuk kawasan Taman Canning. Saya telah memutuskan dan memerintah bahawa terdapat suatu kes prima facie penghinaan Dewan Undangan Negeri Perak oleh Dato Dr Zambry Abdul Kadir. Oleh itu, saya meminta penjelasan daripada ahli yang mulia.

Dato Dr. Zambry tidak memberi sebarang penjelasan atas tindakan beliau. Saya dengan ini memerintah bahawa ahli yang mulia gagal menawarkan sebarang penjelasan atas tindakan mereka yang menghina Dewan Undangan Negeri dan salah seperti yang didakwa.

Saya berpendapat bahawa penghinaan Dewan Undangan Negeri adalah serius.

Dalam mempergunakan kuasa saya sebagai Yang Dipertua Dewan Undangan Negeri Perak, saya dengan ini membuat perintah/keputusan seperti berikut, i.e. bahawa ahli yang mulia ini, Dato Dr Zambry Abdul Kadir adalah dengan serta merta digantung dan dilarang dari menghadiri sessi-sessi DUN selama 18 bulan.

...

Y B V Sivakumar

Tuan Yang Dipertua Dewan Undangan Negeri Perak

18hb Februari 2009

[7] On the same day the second to the seventh applicants were also served with letters dated 18 February 2009 which stated that the first respondent had found them guilty as charged and in exercising his powers as speaker had suspended them from attending sessions of the State Legislative Assembly for a period of 12 months. The material parts of the letter suspending them read as follows:

YANG DIPERTUA DEWAN NEGERI PERAK DARUL RIDZUAN

Kesemua 6 Ahli Yang Mulia Dewan Undangan Negeri Perak; Zainol Fadzi Paharuddin, Datuk Ramly Zahari, Hamidah Osman, Datuk Saarani Mohamad, Mohd Zahir Abdul Khalid dan Dr Mah Hang Soon telah disaman di hadapan Jawatankuasa Hak dan Kebebasan berdasarkan dakwaan seperti disaman.

Saya telah mengadakan suatu mesyuarat untuk mendengar keterangan Pengadu, YB Wong Kah Woh, Ahli Dewan Undangan Negeri untuk kawasan Taman Canning. Saya telah memutuskan dan memerintah bahawa terdapat suatu kes prima facie penghinaan Dewan Undangan Negeri Perak oleh mereka. Oleh itu, saya meminta penjelasan daripada ahli-ahli yang mulia.

6 ahli yang berkenaan telah gagal dan tidak memberi sebarang penjelasan atas tindakan mereka. Saya dengan ini memerintah bahawa 6 ahli yang berkenaan gagal menawar sebarang penjelasan atas tindakan mereka yang menghina Dewan Undangan Negeri dan salah seperti yang didakwa.

Saya berpendapat bahawa penghinaan Dewan Undangan Negeri adalah serius.

Dalam mempergunakan kuasa saya sebagai Yang Dipertua Dewan Undangan Negeri Perak, saya dengan ini membuat perintah/keputusan seperti berikut, i.e. bahawa setiap ahli tersebut di atas iaitu; Zainol Fadzi Paharuddin, Datuk Ramly Zahari, Hamidah Osman, Datuk Saarani Mohamad, Mohd Zahir Abdul Khalid dan Dr Mah Hang Soon adalah dengan serta-merta digantung dan dilarang dari menghadiri sessi-sessi DUN selama 12 bulan.

A Y B V Sivakumar

Tuan Yang Dipertua Dewan Undangan Negeri Perak

18hb Februari 2009

B **[8]** The respondent had stated in the affidavit affirmed by him that the decision to suspend the applicants was a collective decision of the committee of privileges and himself. He further affirmed that in the sitting of the State Legislative Assembly held on the 3 of March 2009 the assembly had adopted the report of the committee of privileges dated 18 February 2009 on the C matter by way of resolution. The sitting had been summoned by he himself after his request to His Royal Highness the Sultan of Perak to summon the Legislative Assembly met with no response.

D **[9]** The applicants then filed an Originating Summons No 24–247 of 2009 dated 2 March 2009 at the High Court in Ipoh seeking, inter alia, the following orders:

(a)

E (1) A declaration that the decision of the first respondent in suspending and prohibiting the first applicant from attending the State Legislative Assembly for a period of 18 months is against the Laws of the Constitution of Perak and is accordingly null and void;

F (2) A declaration that the decision of the first respondent in suspending and prohibiting the first applicant from attending the sitting of the State Legislative Assembly for a period of 18 months is ultra vires the Laws of the Constitution of Perak, the Standing Orders of the State Legislative Assembly of Perak, the Legislative Assembly (Privileges) Enactment, 1959 and/or all related laws and is accordingly null and G void;

(3) A declaration that the first respondent's act of suspending and prohibiting the first applicant from attending the sitting of the State Legislative Assembly for a period of 18 months is illegal;

H (4) A declaration that the decision of the first respondent in suspending and prohibiting the second to the seventh applicants from attending the sitting of the State Legislative Assembly for a period of 12 months is against the Laws of the Constitution of Perak and is I accordingly null and void;

(5) A declaration that the decision of the first respondent in suspending and prohibiting the second to the seventh applicants from attending the sitting of the State Legislative Assembly for a period of 12 months is ultra vires the Laws of the Constitution of Perak, the

Standing Orders of the State Legislative Assembly of Perak, the Legislative Assembly (Privileges) Enactment, 1950 and/or all related laws and is accordingly null and void;

(6) A declaration that the first respondent's act of suspending and prohibiting the second to the seventh applicants from attending the sitting of the State Assembly for a period of 12 months is illegal;

(7) Further, a declaration that the applicants are entitled to attend and take part in all State Assembly sittings and to carry out all their functions and duties therein;

(8) Further, a declaration that the second respondent is not bound by the decision of the first respondent in suspending and prohibiting the applicants from attending the sitting of the second respondent;

(9) Further, a declaration that the second respondent is not bound by any directions, order and/or guidelines of the first respondent arising from or relating to the decision of the first respondent of 18 February 2009; and

(10) Such further or other relief that the court deems fit and proper.

[10] The applicants then filed a Notice of Motion No 06–4 of 2009(A) dated 6 April 2009 in the Federal Court for certain questions to be answered pursuant to art 63 of the Constitution of Perak ('art 63'). The questions are:

(i) Whether on a true interpretation of art XLIV of the Perak State Constitution read together with the Standing Orders of the Legislative Assembly and Legislative Assembly (Privileges) Enactment 1959 and/or all relevant laws, the first defendant's decision to suspend and prohibit the first plaintiff from attending sessions of the State Legislative Assembly for 18 months, was ultra vires and therefore, null and void;

(ii) Whether on a true interpretation of art XLIV of the Perak State Constitution read together with the standing orders of the Legislative Assembly and Legislative Assembly (Privileges) Enactment 1959 and/or all relevant laws, the first defendant's decision to suspend and prohibit the second till the seventh plaintiffs from attending sessions of the State Legislative Assembly for 12 months, was ultra vires and therefore, null and void;

(iii) Whether on a true interpretation of art XLIV of the Perak State Constitution read together with the standing orders of the Legislative Assembly and Legislative Assembly (Privileges) Enactment 1959 and/or all relevant laws the charges framed against the plaintiffs vide the summons to attend the committee of privileges dated 13 February 2009 are capable of constituting a contempt against the State Assembly.

(iv) Whether the speaker can call for a reassembly of the Perak State Legislative Assembly without a proclamation of the Ruler summoning the Assembly under Standing Orders 8(1) read with art XXXVI(1) of the Laws of the Constitution of Perak Darul Ridzuan.

(v) If the answer to Q (iv) is in the negative then whether the 'reassembling' of the State Legislative Assembly on 3 March 2009 was lawful.

(vi) If the answer to Q (v) is in the negative, then whether any motion or resolution passed in such Assembly is binding/legal/lawful.

[11] When the case was called up for hearing before us on 13 April 2009 learned counsel for the applicants said that the Dewan Undangan Negeri Perak has been withdrawn as a party to the proceedings leaving behind only the respondent. Learned counsel for the respondent then said that an application had been filed in the High Court to strike out the proceeding on the grounds that the subject matter of the suit is not justiciable and that the proceeding ought to have been commenced by way of judicial review. The hearing of the application had commenced and arguments were heard by the High Court on 2 April 2009 and was adjourned to 9 April 2009. It was then taken off in view of the application made to transfer the proceedings to this court. Learned counsel added that if the case is not remitted back to the High Court then he would raise the same objections before us. Both learned counsel for the applicants and the Honourable Attorney General said that as the case is still pending in the High Court it can still be heard by this court. In order to resolve the objection raised it is first necessary to have a closer look at art 63. It reads as follows:

> Without prejudice to any appellate or revisional jurisdiction of the Federal Court, where in any proceedings before another court, a question arises as to the effect of any Article in the laws of the Constitution or any part thereof, the Federal Court may, on the application of either party to the proceedings, determine that question and either dispose of the case or remit it to the other court to be disposed of in accordance with the determination.

[12] A question as to the effect of any article in the Laws of Constitution of Perak may arise at any stage of the proceedings. It may be implicit in the pleadings itself thereby warranting an application for the transfer of the proceeding at the commencement of the hearing or it may arise only in the course of the hearing or it may become apparent only after the hearing had commenced. This is clear from the definition of the word 'proceeding' itself which is defined in *Black's Law Dictionary* (6th Ed) as:

> In a general sense, the form and manner of conducting juridical business before a court or judicial officer. Regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment.

[13] Thus an application for the transfer of the case to the Federal Court may be made at any stage of the proceedings. A

[14] Accordingly, we dismissed the objection raised. Needless to say, learned counsel for the respondent will not be precluded from raising the objection which he intended to raise in the High Court before us. B

[15] The objection raised by learned counsel for the respondent was that as the respondent had been sued in his capacity as speaker the action ought to have been commenced under O 53 of the Rules of the High Court 1980 ('O 53') for judicial review. He referred to the judgments of the Court of Appeal in *Dato Seri Anwar bin Ibrahim v Perdana Menteri Malaysia & Anor* [2007] 4 MLJ 422, *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2008] 5 MLJ 773 and *Robert Cheah Foong Chiew v Lembaga Jurutera Malaysia* [2009] 1 MLJ 676 and contended that any challenge to the decision of a public authority can only be commenced by way of judicial review. In his reply learned counsel for the applicants said that O 53 is not applicable in this case as there is no review of any decision that is involved. The declaration that is sought is only that the decision of the respondent to suspend the applicants is unconstitutional and ultra vires. He also argued that the right to seek declaratory relief is a statutory right conferred by s 41 of the Specific Relief Act 1950 ('s 41'). He then referred to cases such as *Petaling Tin Bhd v Lee Kian Chan* [1994] 1 MLJ 657, *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] 2 MLJ 169 and *Teh Guan Teik v Inspector General of Police* [1998] 3 MLJ 137, where it was held that applications for declaratory relief and certiorari are alternative remedies and are not mutually exclusive. Puan Azizah binti Haji Nawawi who submitted on behalf of the Honourable Attorney General said that as the applicants are seeking to have their legal rights asserted s 41 is applicable and that O 53 is thereby not the appropriate remedy. C D E F G

[16] In order to resolve the objection raised by learned counsel it is first necessary to set out the relevant parts of O 53 prior to its amendment in the year 2000 and O 15 r 16 of the Rules of the High Court 1980 ('O 15 r 16'). H

Order 53

APPLICATION FOR ORDER OF MANDAMUS, PROHIBITION, CERTIORARI, ETC

No application for order of mandamus, etc. without leave. I

1

(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule.

(2) An application for such leave must be made ex parte to the Court, except in vacation when it may be made to a Judge in Chambers, and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits, to be filed before the application is made, verifying the facts relied on.

(3) The applicant must give notice of the application for leave not later than the preceding day to the Attorney General's Chambers and must at the same time lodge in those Chambers copies of the statement and affidavits.

(4) The court or Judge may, in granting leave, impose such terms as to costs and as to giving security as it or he thinks fit.

(5) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the Court or Judge so directs, operate as a stay of the proceedings in question until the determination of the application or until the Court or Judge otherwise orders.

Order 15 rule 16

No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed.

[17] What requires deliberation in the light of the submissions advanced by the parties is whether O 53 and O 15 r 16 are mutually exclusive. Reference will first be made to cases on this issue prior to the amendment of O 53 in the year 2000. In *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] MLJ 167 it was suggested that the only remedy available on the facts of the case was certiorari but the Privy Council ruled that the remedy by declaration was available also. In *Sugumar Balakrishnan v Chief Minister of State of Sabah & Anor* [1989] 1 MLJ 233 it was held that declaration and certiorari are concurrent remedies and not mutually exclusive. In *Petaling Tin Bhd v Lee Kian Chan* [1994] 1 MLJ 657 Edgar Joseph SCJ said at p 675;

Indeed, even the availability of a prerogative order will not be a sufficient ground for the dismissal of declaratory proceeding. This was plainly indicated in *Pyx Granite Co v Ministry of Housing and Local Government* [1960] AC 260. There, Lord Goddard said, obiter (at p 290):

I know of no authority for saying that if an order or decision can be attacked by certiorari the court is debarred from granting a declaration in an appropriate case. The remedies are not mutually exclusive, though no doubt there are some orders, notably convictions before justices, where the only appropriate remedy is certiorari.

[18] In *Teh Guan Teik v Inspector General of Police* [1998] 3 MLJ 137, Peh Swee Chin FCJ said at p 147: **A**

> Before us, learned counsel for the Inspector-General of Police persisted with the line of argument based on the ratio of the Court of Appeal in the instant case, ie that the correct procedure should have been an application for order of certiorari as provided under O 53 of the Rules of High Court 1980 ('the RHC'). No authority was cited by him. Learned counsel for the police sergeant on the other hand, relied on the well known case of *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] MLJ 169, being a Privy Council appeal from the then Malaya in which Lord Denning held, in an action for declaration that the dismissal of a police inspector was void, and the Privy Council agreed with the view of the High Court in that case that the remedy by way of declaration, was also available to the inspector as well as the remedy by certiorari. Lord Denning was delivering the opinion of the board. Learned counsel for the police sergeant also relied on *Sugumar Balakrishnan v Chief Minister of State of Sabah & Anor* [1989] 1 MLJ 233 in which it was held that the fact that the remedy of certiorari was available to the plaintiff then could not debar him from claiming the remedy of declaration and both were concurrent remedies. **B** **C** **D**
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> Was the Court of Appeal correct in holding the way it did as stated above, ie that the procedure by way of declaration was wrong and that the correct way was by way of certiorari? **E**
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> With very great respect, the view of the Court of Appeal is totally against the weight of authorities and established principles.
>
> First and foremost, O 15 r 16 of the RHC says: **F**
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> > No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of rights whether or not consequential relief is or could be claimed.
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> Order 15 r 16 is statutory authority for a right to sue by declaration, and as if to exalt such right, it says it shall not be open to objection even if no consequential relief is sought. **G**
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> On this O 15 r 16, Abdoolcader J (as he then was) in *Sungai Wangi Estate v UNI* [1975] 1 MLJ 136 stated that the rule ' has the widest application .... It does not prescribe any procedure nor is it limited to any specific matter. It applies to all proceedings for declaration ... where no special procedure is laid down, the claim for a declaratory judgment is brought by way of writ. **H**
>
> Lee Hun Joe CJ (Borneo) in *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101 said: The prevailing view seems to be that the court's jurisdiction to make a declaratory order is unlimited, subject only to its own discretion. **I**

[19] And at pp 149–150:

> Of course, it was feared that the remedy of declaration would virtually destroy the remedy of certiorari by replacing the latter and this, inter alia, led in 1977 to the law reform as embodied in O 53 of the Rules of Supreme Court of England which is different from our own O 53 of the RHC. Order 53 of England brought ten main changes to the earlier O 53, according to the *White Book of 1979* at p 842; please see the changes set out there. The House of Lord's decision of *O' Reilly v Mackman*, in interpreting such changes brought about by the law reform has, according to the guru of administrative law Prof Wade in *Administrative Law* (6th Ed) at p 678, caused 'great uncertainty' and 'a serious setback for administrative law'. The decision was expressly not followed, for obvious reasons, in our courts, eg in *Sugumar*'s case and it was also not followed by the Court of Appeal of Singapore. The decision is not relevant to us and need not be discussed further, based as it was on the law reform which we have, with all deliberateness, not adopted in our RHC.
>
> I would like to make a general observation before I end this judgment of mine, ie that a claim for declaration is a very efficient remedy for an aggrieved citizen against ultra vires actions of all public authorities or governmental bodies. It has no coercive force by itself, inter alia, so that no such governmental body need feel the threat of such force. Thus, if a person's rights are affected by an order from such a public authority, he can sue for a declaration of the impropriety of the said order and if he succeeds, he can ignore the said order with impunity; see *Dyson v Attorney General* [1911] 1 KB 410; or if a government servant categorised under art 132 of the Federal Constitution is dismissed from his post, he can claim a declaration that he still holds it. See *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] MLJ 169.

[20] Order 53 was amended in the year 2000 and the material parts of it and para 1 of the Schedule to the Courts of Judicature Act 1964 read as follows:

> Order 53
>
> Application For Judicial Review
>
> 1.
>
> (1) This order shall govern all applications seeking the relief specified in Paragraph 1 of the schedule to the Courts of Judicature Act 1964 and for the purposes therein specified.
>
> (2) This Order is subject to the provision of Chapter VIII of Part 2 of the Specific Relief Act 1950.
>
> 2.
>
> (1) An application for any of the reliefs specified in Paragraph 1 of the

Schedule to the Courts of Judicature Act 1964 (other than an application for an order of habeas corpus) shall be in Form IIIA.

(2) An application for judicial review may seek any of the said reliefs, including a prayer for a declaration, either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter.

(3) Upon the hearing of an application for judicial review, the Court shall not be confined to the relief claimed by the applicant but may dismiss the application or make any orders, including an order of injunction or monetary compensation:

Provided always that the power to grant an injunction shall be exercised in accordance with the provisions of section 29 of the Government Proceedings Act 1948 and section 54 of the Specific Relief Act 1950.

(4) Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

Paragraph 1 of the Schedule to the Courts of the Judicature Act 1964

1) Prerogative writs

Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by part II of the Constitution, or any of them, or for any purpose.

[21] The new O 53 is similar to O 53 of the English Rules of the Supreme Court as amended in 1977 the material parts of which read as follows:

Application For Judicial Review

Cases appropriate for application for judicial review (O 53 r 1)

1.

(1) An application for –

(a) an order of mandamus, prohibition or certiorari, or

(b) an injunction under section 9 or the Administration of Justice (Miscellaneous Provisions) Act 1938 restraining a person from acting in any office in which he is not entitled to act,

shall be made by way of an application for judicial review in accordance with the provisions of this Order.

(2) An application for a declaration or an injunction (not being an injunction mentioned in paragraph (1) (b)) may be made by way of an application for judicial review, and on such an application the Court may grant the declaration or injunction claimed if it considers that, having regard to–

(a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari,

(b) the nature of the persons and bodies against whom Relief may be granted by way of such an order, and

(c) all the circumstances of the case,

It would be just and convenient for the declaration or injunction to be granted on an application for judicial review.

Joinder of claims for relief (O 53 r 2)

2. On an application for judicial review any relief mentioned in rule 1 (1) or (2) may be claimed as an alternative or in addition to any other relief so mentioned if it arises out of or relates to or is connected with the same matter.

[22] In *O'Reilly v Mackman* [1982] 2 All ER 1124 the House of Lords held that, as a general rule, it is contrary to public policy and as such an abuse of process for a person seeking to establish that a decision or action of a person or body infringes rights which are entitled to protection under public law, to proceed by way of an ordinary claim rather than the judicial review procedure under O 53, thereby evading the provision intended to protect public authorities. It must, however, be observed that this rule is not absolute. As Lord Diplock himself said in his judgment at p 1134:

The position of applicants for judicial review has been drastically ameliorated by the new O 53. It has removed all those disadvantages, particularly in relation to discovery, that were manifestly unfair to them and had, in many cases, made applications for prerogative orders an inadequate remedy if justice was to be done. This it was that justified the courts in not treating as an abuse of their powers resort to an alternative procedure by way of action for a declaration or injunction (not then obtainable on an application under O 53), despite the fact that this procedure had the effect of depriving the defendants of the protection to statutory tribunals and public authorities for which for public policy reasons O 53 provided.

Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained on an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court,

to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of O 53 for the protection of such authorities. A

My Lords, I have described this as a general rule; for, though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons. Whether there should be other exceptions should, in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis a process that Your Lordships will be continuing in the next case in which judgment is to be delivered today (see *Cocks v Thanet DC* [1982] 3 All ER 1135). B C

[23] In *Steed v Secretary of State for the Home Departure* [2000] 3 All ER 226 Lord Slynn of Hadley said at pp 230–232: D

The second question is whether the citizen who has given in his gun can challenge in the court what he considers unreasonable delay in the consideration of his claim or the failure to pay in due time. It is again to my mind plain that he must be able to bring such a challenge by one means or another. The Home Office contends that this can only be done by judicial review, at any rate until all the scheme's procedures have been gone through and his entitlement and the value decided by the FCS. At that stage if the agreed sum due is not paid a claim by summons is possible. Before that stage is reached it is an abuse of process to raise the matter by such a summons. E F

The starting point for this contention is *O'Reilly v Mackman* [1982] 3 All ER 1124; [1983] 2 AC 237 and in particular the passage in the speech of Lord Diplock:

> ... it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of O 53 for the protection of such authorities.' (See [1982] 3 All ER 1124 at 1134; [1983] 2 AC 237 at 285.) G H

That case as followed in *Cocks v Thanet DC* [1982] 2 AC 286 attached particular importance to the protection given to public authorities by RSC O 53 to the extent that leave to bring proceedings was required and a time limit imposed subject to good reason for extending it. I

O'Reilly's case has had an important influence on the regulation of court proceedings where an individual seeks to assert his rights against a public authority. But even in the passage cited, Lord Diplock sets out the position 'as a general rule'. Earlier in his speech, he said that Parliament and the Rules Committee had been:

> ... content to rely on the express and the inherent power of the High Court, exercised on a case to case basis, to prevent abuse of its process whatever might be the form taken by that abuse. Accordingly, I do not think that Your Lordships would be wise to use this as an occasion to lay down categories of cases in which it would necessarily always be an abuse to seek in an action begun by writ or originating summons a remedy against infringement of rights of the individual that are entitled to protection in public law. (See [1982] 3 All ER 1124 at 1134; [1983] 2 AC 237 at 285.)

He accepted further, that although striking out may be appropriate 'normally':

> ... there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons (See [1982] 3 All ER 1124 at 1134; [1983] 2 AC 237 at 285).

Other exceptions, if any, should be decided on a case to case basis. One such exception is to be found in *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 All ER 705; [1992] 1 AC 624 when it was accepted that a claim for private rights could be made by action even if that involved a challenge to a 'public law act or decision'. Another is to be found in *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 All ER 575 at 581; [1996] 1 WLR 48 at 57 when in a speech with which other members of the House of Lords agreed, I said:

> The recognition of Lord Diplock that exceptions exist to the general rule may introduce some uncertainty, but it is a small price to pay to avoid the over-rigid demarcation between procedures reminiscent of earlier disputes as to the forms of action, and of disputes as to the competence of jurisdictions apparently encountered in civil law countries where a distinction between public and private law has been recognised ... The experience of other countries seems to show that the working out of this distinction is not always an easy matter. In the absence of a single procedure allowing all remedies-quashing, injunctive and declaratory relief, damages — some flexibility as to the use of different procedures is necessary. It has to be borne in mind that the overriding question is whether the proceedings constitute an abuse of the process of the court.

In *Trustees of the Dennis Rye Pension Fund v Sheffield City Council* [1997] All ER 747 at p 755; [1998] 1 WLR 840 at P 849 Lord Woolf MR said that the guidelines he gave involved:

> ... not only considering the technical questions of the distinctions between public and private rights and bodies but also looking at the practical consequences of the choice of procedure which has been made. If the choice has no significant disadvantages for the parties, the public or the court, then it should not normally be regarded as constituting an abuse.

In the present case, if there had been eg a general challenge to the vires of the scheme — a question as to whether it complies with the statutory intention — it would no doubt be right to begin by an application for judicial review. But here essentially this

claimant says that money was due to him; it was not paid when it was due; he has accordingly suffered damage (valued in terms of interest) because of the delay. I do not see that any of the questions which might arise here cannot be dealt with by a judge on the hearing of the summons or that answering such questions usurps the province of the administration where a discretionary decision is reserved to the administration. Here there are largely either objective questions of fact as to whether the gun is a listed gun and whether the procedures have been completed or they depend on valuation on which evidence can be given and a decision arrived at by a judge.

As a matter of procedure it seems to me that it was more convenient to begin by summons and to deal with a particular claim (and if a real question of law arose to appeal) than by application for judicial review, perhaps followed by an appeal.

[24] Reference may also be made to *Civil Procedure 2008* Vol 5 where it says at p 1532:

> The precise scope of the rule in *O'Reilly v Mackman* is still a matter of debate. Two main approaches have been canvassed in the case law. One approach is that the rule does not apply to claims which are brought to vindicate private law rights even though they involve a challenge to a public law decision or action and may involve determining questions of public law. If this approach is adopted, then the aggrieved person will only be forced to proceed by way of a claim for judicial review where private law rights are not at stake, that is in a case which only raises issues of public law. The alternative approach is that the rule in *O'Reilly v Mackman* applies to all case where the claim involves a challenge to a public law decision or action or involves determining question of public law (subject to certain limited exceptions) whether or not the ultimate aim of the proceedings is to vindicate a private law right. In *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624, the House of Lords left open the question of which of these approaches should be adopted but indicated a preference for the first approach. There, the House held that a claim by a general medical practitioner that the Family Practitioner Committee had acted unlawfully in deciding to reduce the amount that he was paid by way of a practice allowance under the NHS regulations was a claim that could be litigated by way of an ordinary claim notwithstanding the fact that the claim involved a challenge to a public law decision said to be unlawful on public grounds. The claimant had not therefore abused the process of the court by not making an application for judicial review and his claim would not be struck out. The House of Lords said that, even assuming that the rule in *O'Reilly v Mackman* generally required all challenges to public law decisions or actions to be brought by way of judicial review, subject to certain exceptions, this case was either not within the rule or was excepted from it because the claimant's claim was based either on a contractual or statutory private law right to be paid his remuneration in accordance with his terms of service. Accordingly, private law rights dominated the proceedings and the order sought (payment of the full amount of the practice allowance) was one which could not be made in judicial review proceedings. In *Mercury Ltd v Telecommunications Director* [1996] 1 WLR 48, the House of Lords said that it was important to retain flexibility, that the precise limits of what is called private law and public law are by no means worked

out, and that private law proceedings should only be struck out if they are an abuse of the process of the court. For further discussion, see also *Gillick v West Norfolk & Wisbech Area Health Authority* [1986] AC 112 and *Trustees of Dennis Rye Pension Fund v Sheffield City Council* [1998] 1 WLR 1629. See generally Ch 3 in *Lewis, Judicial Remedies in Public Law*.

[25] The rule in *O'Reilly v Mackman* [1982] 3 All ER 1124 has been adopted by the Court of Appeal in cases such as *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2002] 2 MLJ 413, *Dato Seri Anwar bin Ibrahim v Perdana Menteri Malaysia & Anor* [2007] 4 MLJ 422 and *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2008] 5 MLJ 773. However, due to the uncertainties in the rule in *O'Reilly v Mackman* [1982] 3 All ER 1124 in England itself the adoption of the rule in that case locally must be done so with care and caution as in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2002] 2 MLJ 413. The result is that the remedies of declaratory relief under O 15 r 16 and certiorari must still be regarded generally as being alternatives and mutually not exclusive.

[26] However, whatever restriction there may be on the use of O 15 r 16 it will not apply where a person seeks to assert, inter alia, his right to a legal status. This is statutorily recognised in the form of s 41 which reads as follows:

> Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintif need not in that suit ask for any further relief:
>
> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.

[27] In explaining the words '... legal character …' as appearing in s 41 the *Indian Contract and Specific Relief Act* by Pollock & Mulla (10th Ed) says at p 1065:

> Legal character or any right to any property are species of the same genus, viz 'legal status'. 'Legal character' however does not appear to be a phrase common to jurisprudence nor does it appear to be used in statutes except s 42 of the Specific Relief Act (s 34 of the new Act) and s 41 of the Indian Evidence Act. But what was intended to be meant was 'legal status'. A man's 'legal character' is the same thing as his status which is constituted by the attributes the law ascribes to him in his individual and personal capacity.

[28] *Sarkar's Specific Relief Act* (13th Ed) says at p 316:

> Legal character means the same thing as status (*Kali Kishen v Golam* 13 Cal 3) and includes characteristics which the law attaches to a man in his personal and individual capacity, eg divorce, marriage, adoption, legitimacy (Next *Jehan v Eugene* AIR 1942 Cal 35).
>
> It has, however, been held that the words 'legal character' are wide enough to include the right of franchise and the right of being elected a municipal councillor (*Satnarain v Hanumanprasad* AIR 1946 Lah 85), or the right to remain in service against an illegal order of dismissal (*State of Bihar v Abdul Majid* 1954 SCR 786.

[29] In *Attorney General of Hong Kong v Zauyah Wan Chik and another appeal* [1995] 2 MLJ 620 Gopal Sri Ram JCA (as he then was) in commenting on the jurisdiction of the court to grant declaratory relief under s 41 said at pp 636–637:

> Now, the jurisdiction of a Malaysian court to grant declaratory relief springs from two sources. First there is the statutory basis to be found in s 41 of the Specific Relief Act 1950 which reads as follows:
>
> > Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:
> >
> > > Provided that no court shall make any such a declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.
> >
> > Explanation — A trustee of property is a 'person interested to deny' a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.
> >
> > The procedural adjunct to the statutory basis is to be found in O 15 r 16 of the Rules of the High Court 1980, which provides as follows:
> >
> > > No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed.
>
> The alternative basis for the grant of declaratory relief — a jurisdiction of great antiquity — is the inherent jurisdiction of the court: *Kuluwante (An infant) v Government of Malaysia & Anor* [1978] 1 MLJ 92. It has long been recognised by Indian courts administering their Specific Relief Act 1877 (later revised and re-enacted in 1963) that s 42 of that enactment, which is identical to s 41 of our statute is not a complete code upon the subject of declaratory decrees.

A In *Supreme General Films Exchange Ltd v Brijnath Singhji* AIR 1975 SC 1810, Beg J explained the scope of the declaratory jurisdiction in these words:

> *Kishori Lal*'s case AIR 1952 Punj 387 was cited to show that declaratory decrees falling outside s 42 of the Specific Relief Act are not permissible because s 42, Specific Relief Act is exhaustive on this subject. This view must be held to have been rejected by this court when it declared in *Vemareddi Ramaraghava Reddy v Konduru Seshu Reddy* 1966 Supp SCR 270 at p 277; AIR 1967 SC 436 at p 440:
>
> > In our opinion, s 42 of the Specific Relief Act is not exhaustive of the cases in which a declaratory decree may be made and the courts have power to grant such a decree independently of the requirements of the section. It follows, therefore, in the present case that the suit of the plaintiff for a declaration that the compromise decree is not binding on the deity is maintainable as falling outside the purview of s 42 of the Specific Relief Act.
>
> The result is that s 42 merely gives statutory recognition to a well-recognised type of declaratory relief and subjects it to a limitation, but it cannot be deemed to exhaust every kind of declaratory relief or to circumscribe the jurisdiction of courts to give declarations of right in appropriate cases falling outside s 42.
>
> We think that the circumstances in which a declaratory decree under s 42 should be awarded is a matter of discretion depending upon the facts of each case. No doubt a complete stranger whose interest is not affected by another's legal character or who has no interest in another's property could not get a declaration under s 42 of the Specific Relief Act with reference to the legal character or the property involved.

The Federal Court in *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177 cited and applied the decision of the Indian Supreme Court in Supreme General Films Exchange Ltd and in other Indian cases. The relevant passage reads as follows (at p 178):

> It will be necessary at the outset to consider the scope of the power to grant declaratory orders and judgments. Chapter VI of the Specific Relief Act 1950 deals with declaratory decrees and s 41 thereof provides for the discretion of the court as to declarations of status or right. Section 41 of the Specific Relief Act was textually adopted totidem verbis from s 42 of the Indian Specific Relief Act and Civil Procedure Code, s 41 of the Specific Relief Act 1877 (now s 34 of the Indian Specific Relief Act 1963), and on an application of the law enunciated by the Privy Council and the Supreme Court of India in relation to the equivalent provisions in the Indian Specific Relief Act and Civil Procedure Code, s 41 of the Specific Relief Act gives statutory recognition to a well-recognised type of declaratory relief and subjects it to a limitation but it cannot be deemed to exhaust every kind of declaratory relief or to circumscribe the jurisdiction of the courts to give declarations of right in appropriate cases falling outside it. The court has power to grant such a decree independently of the requirements of the section, and such a declaration outside the purview of this statutory enactment will be governed by the general provisions of O 15 r 16

of the Rules of the High Court 1980 which will then apply *(Supreme General Films Exchange Ltd v His Highness Maharaja Sir Brijnath Singhji Deo of Maihar & Ors*, following *Vemareddi Ramaraghava Reddy & Ors v Konduru Seshu Reddy & Ors* relying on the decisions of the Privy Council in *Fischer v Secretary of State for India in Council* (1899) 26 IA 16 and *Partab Singh v Bhabuti Singh* (1913) 40 IA 182).

While I cannot possibly agree to the reference to O 15 r 16 as providing a jurisdictional basis (see *Government of Malaysia v Lim Kit Siang* [1998] 2 MLJ 12), I respectfully agree with the proposition that s 42 is not exhaustive and does not constitute the sole jurisdictional basis for the grant of declaratory relief.

[30] Clearly the challenge of the applicants to their suspension from the Legislative Assembly is a matter that affects their legal status within the meaning of s 41. They are therefore entitled to seek a declaration of their legal right pursuant to O 15 r 16. It cannot be argued that they ought to have proceeded under O 53 itself for declaratory relief for two reasons. Firstly, O 53 does not say it is the exclusive provision for the grant of declaratory relief as stated by Lord Diplock in *O'Reilly v Mackman* [1982] 3 All ER 1124 at p 1134 in the following words:

My Lords, O 53 does not expressly provide that procedure by application for judicial review shall be the exclusive procedure available by which the remedy of a declaration or injunction may be obtained for infringement of rights that are entitled to protection under public law; nor does s 31 of the Supreme Court Act 1981. There is great variation between individual cases that fall within O 53 and the Rules of Committee and subsequently the legislature were, I think, for this reason content to rely on the express and the inherent power of the High Court, exercised on a case to case basis, to prevent abuse of its process whatever might be the form taken by that abuse. Accordingly, I do not think that Your Lordships would be wise to use this as an occasion to lay down categories of cases in which it would necessarily always be an abuse to seek in an action begun by writ or originating summons a remedy against infringement of rights of the individual that are entitled to protection in public law.

[31] Secondly, when the Specific Relief Act 1950 was enacted O 53 was not in existence and, thus, adherence to it could not have been contemplated.

[32] Be that as it may, and in any event, in cases of this nature the most appropriate form of relief is by way of declaration. In support reference is made to *The Declaratory Judgment* (2nd Ed) by Lord Woolf where it says at p 90:

The courts are, and should be, acutely sensitive not to impinge on the jurisdiction and sovereignty of Parliament. In litigation close to the sometimes indistinct boundary between the respective jurisdictions of the courts and Parliament, the

declaratory power of the courts is particularly important since a declaration will often be the only remedy they will be willing or able to grant (*R v HM Treasury, ex p Smedley* [1985] QB 657 at 672 and *R v Boundary Commission, ex p Foot* [1983] 1 QB 600 at 634. Prerogative remedies and injunctions are unsuitable, and almost certainly unavailable, to control parliamentary proceedings (*R v Hastings Local Board of Health* [1865] 6 B & S 401 distinguished in *R v Electricity Commissioners* [1924] 1 KB 171 at 209 and p 465 et seq; *Wade: Administrative Law* (6th Ed 1988), at pp 590–591, p 645; de Smith: *Judicial Review of Administrative Action* (4th Ed 1980) at pp 387, 395. *Merricks v Healthcrat-Amoroy* [1955] Ch 567; *Harpar v The Home Secretary* [1955] Ch 238; *R v Department of Transport (Nos 1 and 2), ex p Factortane* [1990] 2 AC 85). Such jurisdiction as the courts have to grant declaratory relief in relation to Parliament is especially constrained in two areas, the first relating to parliamentary privilege, and the second to parliamentary legislation and resolutions.

[33] Accordingly, we dismissed the objection raised and proceeded to hear the motion.

[34] As we answered only the first two questions this part of the judgment shall be confined only to an analysis of the law relating to them. In answering the questions it must be remembered that the alleged contempts committed by the applicants resulting in their suspension did not arise within the walls of the Legislative Assembly but outside it. This is obvious as the charge against them is for, inter alia, wrongly holding themselves out as Menteri Besar and Executive Council Members respectively. Thus the critical issue for deliberation is whether provision has been made for such contempts as envisaged by the two questions.

[35] The submission of learned counsel for the respondent is that the issues raised by the applicants are not justifiable and, in support, relied on art 72(1) of the Federal Constitution ('art 72(1)') and the Legislative Assembly (Privileges) Enactment 1959 of Perak. In further elaboration he referred to cases such as *Tun Datu Haji Mustapha bin Datu Harun v Legislative Assembly of State of Sabah* [1986] 2 MLJ 388, *Bradlaugh v Gossett* (1884) 12 QBD 271, *British Railway Board v Pickin* [1974] AC 765, *Lim Cho Hock v Speaker, Perak State Legislative Assembly* [1979] 2 MLJ 85, *Fan Yew Teng v Government of Malaysia* [1976] 2 MLJ 262 and *Haji Salleh bin Jafaruddin v Datuk Celestine Ujang* [1986] 2 MLJ 412. He also relied on Standing Orders 89 and 90 of the Standing Orders of the State Legislative Assembly of Perak to argue that it was up to the Speaker to decide on matters of privilege and that the Speaker has a general power to do anything including the power of suspension. In his submission the Honourable Attorney General said that no rules have been made pursuant to Article XLIV of the Perak Constitution in respect of contempt and the punishment for it. In contending that such rules are necessary he referred to *Kielley v Carson* [1841–1842] 4 Moore 63, *Fenton v*

Hampton [1858] 11 Moore 347 and *Doyle v Falconer* (1865–67) LR 1 PC 328. He added that these cases were held to be inapplicable in Singapore in the case of *JB Jeyaratnam v Attorney General of Singapore* [1989] 1 MLJ 137 as their Parliament (Privileges, Immunities and Powers) Act 1985 expressly confers such powers. On the issue of justiciability he said that the courts have the power to adjudicate on matters of the Legislative Assembly when they exceed the constitutional powers vested in them. In support he referred to *Tun Datuk Haji Mohamed Adnan Robert v Tun Datu Haji Mustapha bin Datu Harun* [1987] 1 MLJ 471, *Lim Kit Siang v Dato Seri Dr Mahathir Mohamad* [1987] 1 MLJ 383, *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112, *The Speaker of the National Assembly v De Lille MP & Anor* [1999] ZASCA 50, *Raja Ram Pal v The Hon'ble Speaker, Lok Sabha & Ors SCC 3* [2007] 184. Learned counsel for the applicants adopted the submission of the Honourable Attorney General.

[36] It is perhaps necessary to resolve the question of justiciability of the orders sought by the applicants before proceeding any further. This is governed by art 72(1) It reads as follows:

> The validity of any proceedings in the Legislative Assembly of any state shall not be questioned in any court.

[37] The operative words in the provision are '… proceedings in the Legislative Assembly …'. In considering the meaning of the expression 'proceedings in Parliament' *Parliamentary Practice* (20th Ed) by Erskine May says at p 92:

> The primary meaning, as a technical parliamentary term, of 'proceedings' (which it had at least as early as the seventeenth century) is some formal action, usually a decision, taken by the House in its collective capacity. This is naturally extended to the forms of business in which the House takes action, and the whole process, the principal part of which is debate, by which it reaches a decision.
>
> An individual Member takes part in a proceeding usually by speech, but also by various recognised kinds of formal action, such as voting, giving notice of a motion, etc, or presenting a petition or a report from a Committee, most of such actions being time-saving substitutes for speaking. Officers of the House take part in its proceedings principally by carrying out its orders, general or particular. Strangers also can take part in the proceedings of a House, eg by giving evidence before it or before one of its committees, or by securing the presentation of their petitions.
>
> While taking part in the proceedings of a House, members, officers and strangers are protected by the same sanction as that by which freedom of speech is protected, namely, that they cannot be called to account for their actions by any authority other than the House itself.

[38] In determining the scope of art 72(1) it must be remembered that in Malaysia the Constitution is supreme. As Suffian LP said in *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 at p 113:

> The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of state legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.

[39] In *Lim Kit Siang v Dato Seri Dr Mahathir Mohamed* [1987] 1 MLJ 383 Salleh Abas LP said at p 386:

> When we speak of government it must be remembered that this comprises three branches, namely, the legislature, the executive and the judiciary. The courts have a constitutional function to perform and they are the guardian of the Constitution within the terms and structure of the Constitution itself; they not only have the power of construction and interpretation of legislative but also the power of judicial review — a concept that pumps through the arteries of every constitutional adjudication and which does not imply the superiority of judges over legislators but the Constitution over both. The courts are the final arbiter between the individual and the state and between individuals inter se, and in performing their constitutional role they must of necessity and strictly in accordance with the constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action.

[40] In *Tun Datuk Haji Mohamed Adnan Robert v Tun Datu Haji Mustapha bin Datu Harun; Datuk Joseph Pairin Kitingan v Tun Datu Haji Mustapha bin Datu Harun* [1987] 1 MLJ 471 Abdul Hamid CJ (Malaya) (as he then was) said at p 485:

> The mere fact that a litigant seeks the protection of a political right does not mean that it presents a political question. Whether a matter raises a political question; whether it has been committed by the Constitution to another branch of government is itself a matter for judicial determination because the Constitution has made the courts the ultimate interpreter of the Constitution. The courts accordingly cannot reject a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority.

[41] In the High Court in that case Tan Chiaw Thong J said (with which the Supreme Court agreed) at p 475:

> The first authority is the case of *Fan Yew Teng v Government of Malaysia* [1976] 2 MLJ 262 and it was contended on that authority, that once a LA has dealt with a matter, in this case the matter of the appointment of the Chief Minister and who in that capacity commands the confidence of the majority of members, the court should not interfere directly or indirectly, in the same matter. With respect, as a

proposition, this in my view is obviously too wide, as the authority of the LA must necessarily be confined to matters within its constitutional and legal powers and functions.

[42] Hidayatullah CJ in writing for the Indian Supreme Court in *Cooper v Union of India* AIR 1970 SC 1318 said at p 1320:

> Further the supremacy of a legislature under a written constitution is only within what is in its power but what is within its power and what is not, when any specific act is challenged, it is for the courts to say.

[43] In *Raja Ram Pal v The Hon'ble Speaker, Lok Sabha & Ors, SCC 3* [2007] 184 YK Sabharwal CJ said at para 57:

> In view of the above clear enunciation of law by Constitutional Benches of this court in case after case, there ought not be any doubt left that whenever Parliament, or for that matter any State Legislature, claims any power or privilege in terms of the provisions contained in art 105(3), or art 194(3) as the case may be, it is the court which has the authority and the jurisdiction to examine, on grievance being brought before it, to find out if the particular power or privilege that has been claimed or asserted by the legislative is one that was contemplated by the said constitutional provisions …

[44] In the same case it was also held at para 389(u) that an ouster clause attaching finality to a determination does ordinarily oust the power of the court to review the decision but not on grounds of lack of jurisdiction or it being a nullity for some reason such as gross illegality, irrationality, violation of constitutional mandate, mala fides, non-compliance with rules of natural justice and perversity.

[45] Finally, in the *The Speaker of the National Assembly v De Lille MP & Anor* ZASCA 50 the Supreme Court of Appeal of South Africa held that the suspension of the respondent for uttering certain words in the National Assembly was void. Mahomed CJ in writing for the court said:

> This enquiry must crucially rest on the Constitution of the Republic of South Africa. It is Supreme — not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is

not properly authorised by the Constitution is entitled to the protection of the courts. No Parliament, no official and no institution is immune from Judicial scrutiny in such circumstances.

But it does not follow from this that the Assembly necessarily had the constitutional authority to suspend the respondent from its proceedings in the circumstances which it resolved to do. It is clear that the respondent was not suspended because her behaviour was obstructing or disrupting or unreasonably impeding the management of orderly business within the Assembly, but as some kind of punishment for making a speech in the Assembly some days earlier which did not obstruct or disrupt the proceedings in the Assembly at the time, but was nevertheless considered objectionable and unjustified by others including the majority of members of the ad hoc committee and the Assembly. As was explained by the Privy Council in *Kielley v Carson* (1842) 13 ER 225 the former kind of suspension is a necessary protective measure, the latter not. The question therefore that needs to be determined is not whether the Assembly or the appellant had lawful authority to suspend the respondent from the Assembly as an orderly measure to protect proceedings of the Assembly from obstruction or disruption, but whether or not it had the authority to do so as a punishment or disciplinary measure for making a speech which was not in any way obstructive or disruptive of proceedings in the Assembly, but which was nevertheless open to justifiable objection. That question cannot properly be answered by interpreting the ambit of s 57(1)(a) of the Constitution in isolation, but by reading it together with other relevant provisions including s 58.

Section 58(1) provides that Cabinet members and members of the National Assembly have freedom of speech in the Assembly and its committees, subject to its rules and orders. Section 58(1)(b)(i) goes on to provide that such members are not liable to civil or criminal proceedings, arrest or imprisonment or damages 'for anything they have said in, produced before or submitted to the Assembly or any of its committees'. Section 58(2) states that '[o]ther privileges and immunities of the National Assembly ... may be prescribed by national legislation'.

[46] It follows that art 72(1) must be read as being subject to the existence of a power or jurisdiction, be it inherent or expressly provided for, to do whatever that has been done. The court is empowered to ascertain whether a particular power that has been claimed has in fact been provided for. The issues raised by the applicants are therefore justiciable.

[47] It now becomes necessary to ascertain whether there was any power to authorise the suspension of the applicants on account of the alleged contempt committed by them. As a starting point it is useful to refer to *Doyle v Falconer* LR 1 PC 328 where Colvile J said:

The privileges of the House of Commons, that of punishing for contempt being one, belong to it by virtue of the lex et consuetuds Parliamenti, which is a law peculiar to and inherent in the two Houses of Parliament of the United Kingdom. It cannot, therefore, be inferred from the possession of certain powers by the House

of Commons, by virtue of that ancient usage prescription, that the like powers belong to Legislative Assemblies of comparatively recent creation in the dependencies of the Crown. The question, therefore, is reduced to this: Is the power to punish and commit for contempts committed in its presence are necessary to the existence of such a body as the Assembly of Dominica, and the proper exercise of the functions which it is intended to execute? It is necessary to distinguish between a power to punish for a contempt, which is a judicial power, and a power to remove any obstruction offered to the deliberaties or proper action of a legislative body during its sitting, which last power is necessary for self-preservation. If a Member of a Colonial House of Assembly is guilty of disorderly conduct in the House whilst sitting, he may be removed, or excluded for a time, or even expelled; but there is a great difference between such powers and the judicial power of inflicting a penal sentence for the offence. The right to remove for self-security is one thing, the right to inflict punishment is another.

[48] Thus it has been held in *Kielley v Carson* 4 Moore's PC Cases 63 that the Legislative Assemblies in the British Colonies have, in the absence of express grant, no power to adjudicate upon, or punish, contempts committed beyond their walls.

[49] It is thus manifestly patent that there must be specific legal authority to take cognizance of and punish for contempt. This is particularly significant where the alleged contempt was committed beyond the walls of the Legislative Assembly. The need for such authority is recognised in Article XLIV of the Perak Constitution which reads as follows:

(1) Subject to the provisions of the Federal Constitution and this Constitution, the Legislative Assembly shall regulate its own procedure and may, from time to time, make, amend and revoke standing Rules and Orders for the regulation and orderly conduct of its own proceedings and the conduct of business.

[50] The Standing Orders of the State Legislative Assembly of Perak was passed in 1988. The relevant Orders are Standing Orders 44, 89 and 90. They read as follows:

Standing Order 44

(1) The Chair, after having called the attention of the Assembly, or of the Committee, to the conduct of a member who persists in irrelevance, or in tedious repetition either of his own arguments or of the arguments used by other members in debate, may direct him to discontinue his speech;

(2) The Chair shall order any member whose conduct is grossly disorderly to withdraw immediately from the Assembly during the

remainder of that day's sitting, and the Bentara Dewan shall act on such orders as he may receive from the Chair in pursuance of this Standing Order; but if, on any occasion, the Chair deems that the powers under the previous provisions of this Standing Order are inadequate, he may name such member or members, in which event the same procedure shall be followed as is prescribed in paragraphs (3), (4), (5) and (6).

(3) Whenever a member has been named by the Chair immediately after the commission of the offence of disregarding the authority of the Chair, or of persistently and wilfully obstructing the business of the Assembly by abusing the rules of the Assembly, or otherwise, then, if the offence has been committed by such member in the Assembly, a motion shall forthwith be proposed by the Menteri Besar or any member of the State Executive Council and seconded by another member present, 'That Mr ... be suspended from the service of the Assembly', and Mr Speaker shall forthwith put the question on that motion, no amendment, adjournment or debate being allowed; and, if the offence has been committed in Committee of the whole Assembly, the Chairman shall forthwith suspend the proceedings of the Committee and report the circumstances to the Assembly; and Mr Speaker shall on a motion being made forthwith put the same question, no amendment, adjournment or debate being allowed, as if the offence had been committed in the Assembly itself.

(4) Not more that one member shall be named at the same time, unless two or more members together have jointly disregarded the authority of the Chair.

(5) If a member is suspended under the provisions of this Standing Order, he shall be directed by Mr Speaker to withdraw, and his suspension shall last until the end of the meetings.

(6) If a member, or two or more members acting jointly who have been suspended under this Standing Order from the service of the Assembly, shall refuse to obey the direction of Mr Speaker to withdraw, when severally summoned under Mr Speaker's orders by the Bentara Dewan to obey such direction, Mr Speaker shall call the attention of the Assembly to the fact that recourse to force is necessary in order to compel obedience to his direction. When the member or members named by him as having refused to obey his direction have been removed from the Assembly they shall thereupon without any further question being put be suspended from the service of the Assembly during the remainder of the session.

(7) Members who are ordered to withdraw under paragraph (2) or who are suspended from the service of the Assembly under paragraphs (3)

and (6) shall forthwith withdraw from the precincts of the Assembly and shall be excluded therefrom for the remainder of the sitting or for the period of their suspension, as the case may be.

(8) In the case of grave disorder arising in the Assembly, Mr Speaker may, if he thinks it necessary so to do, adjourn the Assembly without putting any question, or suspend the sitting for a time to be fixed by him; and in the case of grave disorder arising in Committee of the whole Assembly, the Chairman may suspend the proceedings of the Committee and report the circumstances to the Assembly, and Mr Speaker may thereupon take action as though the disorder has arisen in the Assembly.

(9) Nothing in this Standing Order shall be taken to deprive the Assembly of the power of proceeding against any member according to any resolution of the Assembly.

Standing Order 89

The decision of Mr Speaker upon any point of interpretation of any of these Standing Orders, or upon any matter of practice, shall subject to a substantive motion moved for that purpose, be final, and Mr Speaker may from time to time issue rulings thereon.

Standing Order 90

All matters not specifically provided in these Standing Orders and all questions relating to the detailed working of these Standing Orders shall be regulated in such manner, not inconsistent with these Standing Orders, as Mr Speaker may from time to time direct; and in giving any such direction Mr Speaker shall have regard to the usages of Commonwealth Parliamentary practice so far as such usages can be applied to the proceedings of the Assembly.

[51] Standing Order 44 deals with disorderly conduct arising in the Assembly only. Standing Order 89 deals with the powers of interpretation by the Speaker of any of the Standing Orders. Standing Order 90 gives the Speaker power to regulate matters not specifically provided for in the Standing Orders and in doing so he shall have regard to the usages of Commonwealth Parliamentary practice so far as such usages can be applied to the proceedings of the Assembly subject to the requirement that they must not be inconsistent with the Standing Orders. As far as the application of Commonwealth Parliamentary practices in such matters are concerned what can be adopted are only their 'usages' which is defined in *Black's Law Dictionary* (6th Ed) as:

A reasonable and lawful public custom in a locality concerning particular transactions which is either known to the parties, or so well established, general, and uniform that they must be presumed to have acted with reference thereto. Practice in fact. *Electrical Research Products v Gross*, CCA Alaska, 120F 2d 301, 305. Uniform practice or course of conduct followed in certain lines of business or professions or some procedure or phase thereof. *Turner v Donovan*, 3 Cal App 2d 485, 39 P 2d 858, 859. Usage cannot be proved by isolated instances, but must be certain, uniform and notorious.

[52] As *Parliamentary Practice* (20th Ed) by Erskine May says at p 72:

Some privileges rest solely upon the law and custom of Parliament, while others have been defined by statute.

[53] However, as far as the law of contempt is concerned *Kielley v Carson* 4 Moores PC Cases 63 and *Doyle v Falconer* LR 1 PC 328 make it clear that in the Commonwealth countries there must be specific statutory provision to have jurisdiction to deal with it. With regard to the adoption of the power to deal with contempt of the House of Commons Members of Parliament: law and ethics by Gerard Carney says at p 168:

The only certain basis for the incorporation of all the privileges of the House of Common in colonial legislatures was by their wholesale adoption by statute.

[54] This is reflected in s 3 of the Singapore Parliament (Privileges, Immunities and Powers) Act 1985 as demonstrated in *JB Jeyaratnam v Attorney General of Singapore* [1989] 1 MLJ 137. The section reads as follows:

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(1) The powers, privileges and immunities of Parliament and of the Speaker, Members and Committees of Parliament shall be the same as those of the Commons House of Parliament of the United Kingdom and of its Speaker, Members or Committees at the establishment of the Republic of Singapore.

(2) Such privileges, immunities and powers shall for all purposes be construed and have effect as if such privileges, immunities and powers were prescribed by this Act, and it shall not be necessary in any proceedings to plead the same but the same shall be judicially noticed in all the courts.

(3) ...

[55] Thus the power to deal with contempts, not specifically provided for

in the Standing Orders, is not something that the Speaker can take cognizance of under Standing Order 90 as it requires a law to that effect.

[56] Be that as it may, the summonses which were issued to the applicants were done so pursuant to Standing Order 72. It reads as follows:

(1) There shall be a Committee to be known as the Committee of Privileges to consist of Mr Speaker as Chairman and six members to be appointed by the Assembly as soon as may be after the beginning of each session. There shall be referred to this Committee any matter which appears to affect the powers and privileges of the Assembly. It shall be the duty of the Committee to consider any such matters to them referred, and to report on them to Assembly.

(2) When the Assembly is not sitting a member may bring an alleged breach of privilege to the notice of Mr Speaker who may, if he is satisfied that a prima facie breach of privilege has been committed, refer such matter to the Committee, which shall report thereon to the Assembly.

(3) The Committee shall have power to send for persons, papers and documents, and to report from time to time.

[57] Standing Order 72(1) authorises the Committee of Privileges to take cognizance of '... any matter which appears to affect the powers and privileges of the Assembly ... '. In order for a '... matter ... ' to have such an effect it must be unlawful or be an infringement of the powers and privileges of the Assembly. It is only then that it can be said that it appears to affect the powers and privileges of the Assembly. The summonses against the applicants state that their acts constitute contempt. As contempt has not been specifically prescribed for, the acts cannot come within the ambit of Standing Order 72(1). Even the Legislative Assembly (Privileges) Enactment 1959 enacted by the Perak legislative Assembly does not contain any provision for the offence of contempt and its punishment. By way of contrast reference must be made to the House of Parliament (Privileges and Powers) Act 1952 which makes specific provision for contempt.

[58] The corollary is that Article XLIV of the Perak State Constitution read together with the Standing Orders of the Legislative Assembly and the Legislative Assembly (Privileges) Enactment 1959 do not provide for the offence of contempt and the resultant punishment of suspension from attending sessions of the State Legislative Assembly.

[59] In the upshot the suspension of the applicants on account of the

alleged contempt committed by them is null and void. Accordingly we answered questions (i) and (ii) in the affirmative. We did not find it necessary to answer the other questions. It was also our view that the answer to the two questions is sufficient to make a final determination in the case. We therefore granted order in terms of prayers (a)(1) and (4) in the originating summons. We made no order as to costs.

Order in terms of prayers (a)(1) and (4) of the originating summons granted with no order as to costs.

Reported by K Nesan